

**UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA**

)	
CENTER FOR INDIVIDUAL)	
FREEDOM, INC.,)	
)	
Plaintiff,)	
)	
v.)	
)	
NATALIE E. TENNANT, <i>et al.</i>,)	
)	
Defendants;)	
)	
)	Case No. 1:08-0190
WEST VIRGINIANS FOR LIFE, INC.,)	
<i>et al.</i>,)	
)	
Plaintiffs,)	
)	
v.)	
)	
NATALIE E. TENNANT, <i>et al.</i>,)	
)	
Defendants.)	
)	

**PLAINTIFFS' RESPONSE TO DEFENDANT
TIMOTHY D. BOGGE'S MOTION TO DISMISS**

This action is before the Court on Defendant Timothy D. Boggess's Motion to Dismiss (Dkt. No. 226).

As the motion notes (at 1), Plaintiffs Center for Individual Freedom, Inc. ("CFIF"), West Virginians for Life, Inc., and Zane Lawhorn have sued Boggess in his official capacity. If Mr. Boggess no longer holds the position in which he was a defendant, the proper remedy is automatic substitution of his successor. *See, e.g.*, FED. R. CIV. P. 25(d) (2007); *Ragsdale v. Turnock*, 734 F. Supp. 1457, 1464 (N.D. Ill. 1990); *Follette v. Vitanza*, 658 F. Supp. 492, 508

(N.D. N.Y. 1987). The Court has already dismissed a similar motion on mootness grounds following the election of Natalie H. Tennant to succeed Betty Ireland as West Virginia Secretary of State. *See* Dkt. No. 158 (Order of Feb. 25, 2009 denying as moot Plaintiff CFIF's Consent Motion to Substitute Party because Rule 25(d) operates automatically).

Our understanding is that Scott Ash is the new Mercer County Prosecuting Attorney. *See, e.g.,* Bill Archer, *Boggess Tenders Resignation as County Prosecutor*, Bluefield Daily Telegraph, Nov. 11, 2010. Under the Federal Rules, Mr. Ash has automatically been substituted for Mr. Boggess and no further order of the Court is required.

Therefore, the Court should deny Defendant Boggess's Motion to Dismiss as moot.

Respectfully submitted,

/s/ Randy Elf
James Bopp, Jr., Ind. No. 2838-84
Randy Elf, New York No. 2863553
Kaylan Lytle Phillips, Okla. No. 22219
Joseph A. Vanderhulst, Ind. No. 28106-20
JAMES MADISON CENTER FOR FREE SPEECH
1 South Sixth Street
Terre Haute, Ind. 47807
Telephone (812) 232-2434
Facsimile (812) 235-3685
Lead Counsel for Plaintiffs West Virginians for Life, Inc., and Zane Lawhorn

/s/ Shirley J. Stanton
Shirley J. Stanton
Attorney at Law
STANTON LAW FIRM
Post Office Box 968
Fairmont, W. Va. 26555
Telephone (304) 367-0219
Local Counsel for Plaintiffs West Virginians for Life, Inc., and Zane Lawhorn

/s/ William C. Porth
William C. Porth
West Virginia State Bar Id. No. 2943
ROBINSON & MCELWEE PLLC
400 Fifth Third Center
700 Virginia St., East
P.O. Box 1791
Charleston, WV 25301
(304) 344-5800

Jan Witold Baran
Thomas W. Kirby
WILEY REIN LLP
1776 K Street, NW
Washington, DC 20006
(202) 719-7000
Attorneys for Plaintiff Center For Individual Freedom

DATE: February 16, 2011

CERTIFICATE OF SERVICE

I certify that on February 16, 2011, I electronically filed the foregoing "PLAINTIFFS' RESPONSE TO DEFENDANT TIMOTHY D. BOGGESS'S MOTION TO DISMISS" using the CM/ECF system, which will notify the following CM/ECF participants:

Thomas W. Smith
Silas B. Taylor
MANAGING DEPUTY
ATTORNEYS GENERAL
State Capitol Complex
Building 1, Room E-26
Charleston, W. Va. 25305

Anthony Majestro
J.C. Powell
POWELL & MAJESTRO, P.L.L.C.
405 Capitol Street, Suite P-1200
Charleston, W. Va. 25301

Joseph Jenkins
Judith Thomas
Nicholas Preservati
PRESERVATI LAW OFFICES
Post Office Box 1431
Charleston, W. Va. 25325

Patrick Maroney
MARONEY, WILLIAMS, WEAVER & PANCAKE
608 Virginia Street, East
Charleston, W. Va. 25301

Kathy Brown
Teresa Toriseva
WEXLER, TORISEVA & WALLACE
1446 National Road
Wheeling, W. Va. 26003

Shirley J. Stanton
STANTON LAW FIRM
Post Office Box 968
Fairmont, W. Va. 26555
Telephone: (304) 367-0219

James Bopp, Jr.
Randy Elf
Kaylan Lytle Phillips
Joseph A. Vanderhulst
JAMES MADISON CENTER FOR FREE SPEECH
1 South Sixth Street
Terre Haute, Ind. 47807

Stephen Pershing
CENTER FOR CONSTITUTIONAL LITIGATION
Suite 520
777 6th Street, N. W.
Washington, D.C. 20001

I also certify that I have mailed the document by United States Postal Service to the following non-CM/ECF participant:

Robbin Stewart
Post Office Box 29164
Cumberland, Ind. 46229

/s/ Bradley Sorrells
W. Bradley Sorrells
ROBINSON & MCELWEE PLLC